



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20461

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

Carolyn Malenick d/b/a Triad)
Management Services)
Triad Management Services, Inc. and)
Carolyn Malenick, as corporate officer) MURs 4568, 4633, 4634, and 4736
Citizens for the Republic Education)
Fund and Carolyn Malenick, as)
corporate officer)
Citizens for Reform)

STATEMENT OF REASONS OF COMMISSIONER DAVID M. MASON

In this major case arising out of the 1996 election cycle, I voted to pursue this matter up through and including authorization of civil suit against the most important respondents in the case-in-chief.¹ In fact, "[a]s for Triad and its President, Carolyn Malenick, the Commission has pursued their alleged violations as far as the FECA allows."² I write now simply to provide my rationale for declining to vote to find probable cause to believe that Citizens for the Republic Education Fund ("CREF") and Citizens for Reform ("CR") violated 2 U.S.C. §§ 433 and 434 by failing to register and report with the Commission.³ My conclusion as to these respondents rests on the fundamental fairness issues arising from the Commission's posture as to similarly situated respondents; the Commission's determination to file suit against the central, controlling respondents in this matter; and a bedrock principle of prosecutorial discretion.

CR and CREF, two non-profit corporations, undertook television, radio, direct mail, and telephone bank issue advertising in the 1996 election cycle. The details of their activity in the context of Triad, Inc.'s operations are described in the General Counsel's Brief dated July 19, 2001, hereby incorporated by reference as to the facts of the case. For the purposes of this statement, the vital facts gleaned from the papers are simple: none of CREF's or CR's activity constituted express advocacy and Triad, Inc. is clearly the respondent central to the questioned activity.

¹ Currently pending in federal court is the Commission's suit related to the activities of Triad and Carolyn Malenick. *FEC v. Carolyn Malenick d/b/a Triad Management Services, et al.*, Civ. No. 02-CV-01237 (DDC).

² General Counsel's Report in MURs 4568, 4633, 4634 and 4736 dated Nov. 20, 2002 at 5.

³ I joined Commission Smith in voting against the recommendations in May 2002. Commissioner Bradley A. Smith, Statement of Reasons in MURs 4568, 4633, 4634 and 4726, dated October 1, 2002.

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The lack of express advocacy is central to my concern that pursuing CR and CREF would implicate concerns of fundamental fairness. It has been on the basis of the Commission's history in this area and fundamental fairness that in other matters involving communications lacking express advocacy, the Commission has not pursued respondents, failing to find probable cause to believe a violation had occurred.⁴ Fundamental fairness is integral to the Commission's proceedings because

when an agency is exercising powers entrusted to it by Congress, it may have recourse to equitable conceptions in striving for the reasonableness that broadly identifies the ambit of sound discretion. Conceptions of equity are not a special province of the courts but may properly be invoked by administrative agencies seeking to achieve 'the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice.'¹¹

City of Chicago v. Fed. Power Comm, 385 F.2d 629 (D.C. Cir. 1967)(footnote omitted). The "due process clause requires fundamental fairness to be respected in agency proceedings." *Bethlehem Steel Corp. v. E.P.A.*, 638 F.2d 994, 1009 (7th Cir. 1980).

Fundamental fairness is also implicated here by the principle of treating like cases alike. The Commission would be exposed to attack if it went forward as to these particular respondents because our actions are subject to judicial review by the arbitrary and capricious standard under the Administrative Procedure Act.⁵ A Commission decision will be considered arbitrary if we

⁴ Commissioners David M. Mason and Bradley A. Smith, Statement of Reasons in MUR 4538 (Alabama Republican Party, *et al*) dated May 23, 2002 at 7 ("In only one instance – MUR 4503, where the communications at issue contained express advocacy – has the Commission found party communications to be coordinated contributions to a campaign. ... In light of this record, it would be fundamentally unfair to proceed against the Alabama Republican Party. In addition, for pending matters, the Commission's actions leave express advocacy as the de facto content standard for determining whether communications are for the purpose of influencing an election, even when coordination is present."); *see also* Vice Chairman Danny L. McDonald, Statement of Reasons in MURs 4553, *et al.* (Dole for President, Inc.); MUR 4624 (The Coalition); MUR 4503 (South Dakota Democratic Party) (prosecuted only express advocacy); MUR 4476 (Wyoming State Democratic Cent. Comm.); MURs 4291, *et al.* (AFL-CIO).

⁵ Section 706(2)(A) of Title 5 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"treat like cases differently."⁶ It would be offensive to these principles to pursue CR and CREF for their issue advocacy activity, in the face of the Commission's consistent failure to take enforcement action against non-express advocacy speech.

Further, I conclude that the Commission may properly decline to pursue CR and CREF in a proper exercise of its prosecutorial discretion. The cornerstone of the legal basis for this conclusion is the holding of *Heckler v. Chaney*, 470 U.S. 821 (1985), that an agency's decision not to take enforcement action is presumed to be committed to agency discretion by law and hence immune from judicial review under the Administrative Procedure Act). *Heckler* stands for a governing principle of administrative law "envision[ing] a wide latitude for the agency in enforcement decisions..." *National Wildlife Foundation v. E.P.A.*, 980 F.2d 765, 770 (D.C. Cir. 1992).

In *Heckler*, prison inmates, each sentenced to death for their capital offenses,⁷ sought to compel the Food and Drug Administration to take an enforcement action provided for by statute with respect to drugs used for lethal injections. The prisoners objected to the drugs on several bases, including their allegation that use of allegedly unapproved, untested drugs, were likely to be administered by untrained personnel. The prisoners requested that the FDA take enforcement and investigatory actions, the FDA refused, and the prisoners filed suit. The Supreme Court held that there is presumption of unreviewability of decisions of an agency not to undertake enforcement action and that presumption was not overcome by the inmates. The Court's partial rationale for finding decisions not to enforce unsuitable for judicial review is instructive:

[t]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. ... The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Heckler, 470 U.S. at 831-2.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

⁶ An agency's permissible discretion does not include "a license to ... treat like cases differently." *County of Los Angeles v. Shalala*, 192 F.3d 1005 (D.C. Cir. 1999) ((citing *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985)(quoting *United States v. Diapulse Corp.*, 748 F.2d 56, 62 (2d Cir. 1984)).

⁷ Larry Leon Chaney's sentence was modified from death to life imprisonment because the 10th Circuit held, in a different case brought by Chaney, that reports which could have raised an inference in jurors that he did not personally commit the murders could have affected the jury's penalty deliberations. *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984) (affirming the conviction but reversing the death sentence); *Chaney v. Brown*, 699 P.2d 159 (Okla. 1985)(upholding Chaney's re-sentence from death to life imprisonment).

A partial basis of my decision to decline to find probable cause to believe a violation of the Act occurred is reflected in the above-enumerated concerns, given the context of the Commission's overall enforcement of the subject MURs. First and foremost, the Commission addressed the central and controlling entity of the activity at issue by pursuing Triad and its CEO.⁸ The Commission is currently in federal court with this respondent for activity relating to the 1996 election cycle. Triad, Inc., for a time, managed all CR and CREF activities; "Triad managed production of the advertising programs on behalf of CREF and CR, including selection of the media markets, approval of scripts and the authorization of disbursements for production and placement of CREF advertisements."⁹ Under these established notions of prosecutorial discretion, then, it is hardly incumbent upon the Commission to pursue every additional, alleged violation that occurred against every potential respondent that exists, especially when, as noted above, the Commission filed suit against Triad, Inc. Furthermore, because in several enforcement cases the Commission has not pursued entities undertaking non-express advocacy communications, I voted not to find probable cause that CREF and CR violated 2 U.S.C. §§ 433 and 434.

January 22, 2003



David A. Mason
Commissioner

⁸ The Office of the General Counsel recently recommended that the Commission exercise its prosecutorial discretion to decline to pursue further action against Robert Cone with respect to his 1997-1998 activity related to Triad. General Counsel's Report in MURs 4568, 4633, 4634 and 4736 (dated Nov. 20, 2002) at 5. The rationale for the General Counsel's recommendation was essentially that as to this respondent, the Commission already had achieved its enforcement goals. *Id.* ("[T]he Commission has already achieved substantial relief as to Mr. Cone"). The Commission previously entered into a conciliation agreement with him with respect to his 1995-1996 activity providing for a \$25,000 civil penalty, a prohibition on future violations of the provisions at issue, and a waiver of the return of his excessive contributions.

⁹ Brief at 26, 28.